

Date: June 5, 1997

Case No.: 96-INA-29

In the Matter of:

VALLEY REST NURSING HOME,
Employer

On Behalf Of:

JOSE AGUSTIN DIOKNO,
Alien

Appearance: Ralph M. Schelly, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 27, 1993, Valley Rest Nursing Home ("Employer") filed an application for labor certification to enable Jose Agustin Diokno ("Alien") to fill the position of Assistant Administrator (AF 3-4). The job duties for the position are:

Assist the Administrator in directing and coordinating the activities of the medical, nursing and administrative staffs and services of the nursing home. Direct the planning, organizing and control of the operations management function of the nursing home, by evaluating the efficiency of an operations line, improving the productivity of employees, evaluating quality control in delivering services. Perform forecasting, scheduling and inventory management functions with the objective of providing acceptable service at a reasonable cost.

The requirements for the position are a Masters Degree in Business Administration and two years of experience in the job offered or, in the alternative, two years of experience in any supervisory or managerial capacity.

The CO issued a Notice of Findings on March 1, 1995 (AF 105-108). The CO proposed to deny labor certification on several grounds. First, the CO found that the Employer's qualifications were tailored to the Alien's qualifications. As such, the CO instructed the Employer to document the business necessity of its educational requirement. Specifically, the CO requested that the Employer explain why an individual with a Masters Degree in Public Administration or a Bachelor's Degree in Business Administration with additional experience would not be qualified to perform the job opportunity. Finally, the CO questioned the Employer's rejection of several potentially qualified U.S. applicants and instructed him to document that they were rejected for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until April 5, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 10, 1995 (AF 109-113), the Employer argued that the person filling this position must be acquainted with the concepts, logic, and methodology in the field of operations and productivity management of a nursing home. It was further argued that the person must have a solid background in quantitative tools, using spread sheets, business statistics, and quantitative decision-making techniques. As such, the Employer stated that a person with only a

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Bachelor's Degree in Business Administration, even with years of practical experience in Health Care, would not be equipped to perform the functions effectively. The Employer also noted that a Bachelor's Degree in Business Administration is geared towards the private sector, whereas a degree in Public Administration is geared toward the public sector. In addition, the Employer listed the requirements for each program. Finally, the Employer argued that it rejected all U.S. applicants for lawful, job-related reasons.

The CO issued the Final Determination on June 5, 1995 (AF 114-116), denying certification on two grounds. First, the CO found that the Employer failed to document why an applicant with a Bachelor's Degree in Business Administration and up to six years of experience in a managerial position would not qualify for the job offered. Furthermore, the CO found that the Employer failed to document lawful, job-related reasons for rejecting a potentially qualified U.S. applicant.

On June 28, 1995, the Employer requested review of the Denial of Labor Certification (AF 125-127). On October 2, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a brief on November 22, 1995.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show the following: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 90-INA-395 (June 30, 1992).

In the instant case, the CO asked the Employer to document the business necessity of its requirement of a Master's Degree in Business Administration plus two years of experience in the job required (AF 104-108). Specifically, the CO asked the Employer to explain why a Bachelor's Degree and more experience in the job offered or a related occupation would not be an acceptable combination of education and experience for the job required.

In rebuttal the Employer argued that it is looking for someone who would be comfortable, not only in financial and marketing areas, but most importantly in operations management (AF 109-113). The Employer stated that the person must be acquainted with the concepts, logic and methodology in the field of operations and productivity management of a nursing home, which includes:

- Overall efficiency evaluation of operations, routings and processes using techniques like line balancing, time study, etc. that may result to introduction of new or revised systems and procedures
- Productivity improvement of employees
- Quality control evaluation in terms of delivering service
- Forecasting and inventory control management
- Controlling the Work, Schedule and Costs

(AF 111). The Employer continued by arguing that the person must have a solid background in quantitative tools, using spreadsheets, basic statistics, and quantitative decision-making techniques. Finally, the Employer stated that a “person with only a Bachelor’s Degree in Business Administration, even with years of practical experience in Health Care, would not be equipped to perform the functions above-mentioned effectively. We need someone who is capable, not just available, to handle the job and help our organization survive.”

In the Final Determination, the CO found that the Employer failed to document why an applicant with a Bachelor’s Degree in Business Administration and up to six years of experience in a managerial position would not qualify for the job offered (AF 114-116). We agree with the CO. The business necessity for a certain job is not established where the employer does not demonstrate why an employee having experience in the job skills could not perform the job as well as a person with the educational degree sought. *Business Men’s Insurance*, 88-INA-78 (May 31, 1989) (*en banc*). Furthermore, business necessity for a restrictive degree requirement is not established where the employer fails to provide any supporting documentation. *John Hancock Financial Services*, 91-INA-131 (June 14, 1992). Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. Beyond making the statement that, “a person with only a Bachelor’s Degree in Business Administration, even with years of practical experience in Health Care, would not be equipped to perform the functions above-mentioned effectively,” the Employer in this case failed to explain and document why an applicant with a Bachelor’s Degree in Business Administration and six years of experience would not be able to adequately perform the job as described by the Employer.

Therefore, we find that the Employer has not shown that a Master’s Degree in Business Administration is essential to perform, in a reasonable manner, the job duties as described by the

Employer. *Information Industries, supra*. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.²

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

² In its Request for Review, the Employer supplied a list of the courses that must be taken to earn a Bachelor's Degree in Business Administration, as well as the courses that must be taken to earn a Master's Degree in Business Administration. However, this still does not explain why an individual with a Bachelor's Degree plus experience would not be able to adequately perform the job duties. Furthermore, it is well settled that evidence first submitted with the Request for Review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). The CO clearly presented the issues in the NOF and the Employer had every opportunity to present all relevant evidence in his rebuttal.